A Proposal for an Objective Standard to Determine Improper Methods of Interrogation: How Far May Interrogators Go to Induce Confessions?

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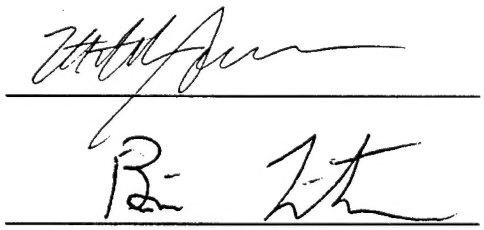

ABSTRACT

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by

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Modern confession law relies on subjective tests of admissibility when excluding confessions. As a result, court rulings are inconsistent, and there is little guidance for police conduct. This thesis proposes that an objective standard will help to clarify confession law. This proposal uses objective unreliability and unconstitutionally obtained *Miranda* waivers as the basis for improper conduct and grounds for the exclusion of the induced confessions.

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I. INTRODUCTION AND SCOPE*

The primary concern of confession law is encapsulated in this broad question: when is a defendant's confession valid for any legal purpose; or, in other words, when should a confession be excluded? While Confessions are excluded for a variety of procedural and substantive reasons, there are essentially two justifications for the exclusion of confessions: either (1) the confession is too likely to be untrue; or (2) the confession was obtained by improper interrogation practices. In other words, the reasons for invalidating a confession are, respectively, unreliability and impropriety.

Unreliability and impropriety are obvious reasons why confessions are excluded; however, the controversial issue is determining when these conditions are satisfied. In many cases subjective tests are applied by considering the defendant's particular characteristics and powers of resistance to determine whether particular interrogation methods created an overly substantial a risk of falsity. There are three problems with current confession law. Most importantly, there is little guidance from above which the lower courts can use to make consistent rulings. Second, because of lower courts' inconsistent rulings, interrogators are uncertain as to which tactics are permissible. Third, suspects are

* I would like to express my gratitude to Professor Mitchell N. Berman, Professor of Law at the University of Texas at Austin, for his helpful comments and critiques on this thesis and preceding drafts. I am also indebted to Yonit Sharaby for her relentless revisions and constant support.

at a greater risk that interrogators will disregard constitutional protections when rules are ill-defined.

Basing decisions on subjective tests does not help eliminate any of these problems. In order to provide better guidance as to which interrogation methods are improper, a concrete and administrable standard is pragmatically necessary. The purpose of this paper is to propose an objective standard for excluding confessions that are obtained through improper methods of interrogation.

There are, of course, other procedural reasons why confessions are inadmissible that have nothing to do with interrogation methods. For example, mental illness, third party threats, drug use, or drunkenness at the time of the interrogation may be grounds for doubting the reliability of a particular confession. This paper focuses only on grounds for exclusion based on improper interrogation methods, and not on circumstances outside the scope of the interrogation process.

This objective proposal consists of two tests for determining whether an interrogation method is impermissible: Confessions are improperly obtained for two reasons: either (1) the conduct would make an innocent person confess; or (2) trickery or other forms of deception are used to obtain a *Miranda* waiver. Test (1)

is an objective unreliability test, and (2) is based on constitutional considerations of voluntariness that *Miranda* rights are meant to protect.

This proposal is essentially a narrowly tailored version of a reliability-voluntariness test. Although unreliability is built into the standard for determining impropriety, it is an objective test. This is because there is a distinction between objective unreliability and subjective unreliability:

> A good deal turns on whether one means: (A) Is *this particular* defendant's confession "unreliable" or "untrustworthy?" of (B) What is the likelihood, objectively considered, that the interrogation methods employed in this case create a substantial risk that a person subjected to them will falsely confess—*whether or not this particular defendant did*?[1]

Objective unreliability refers to conduct that would be likely to make an innocent person confess. It is not important whether police conduct actually does induce a false confession for a particular defendant, but that it would tend to induce false confessions. In contrast, subjective unreliability relies only on an assessment of the particular defendant's characteristics and powers of resistance.

In light of the differences between subjective and objective reliability, subjective standards should have no bearing on the propriety of interrogation methods. A primary reason is, improperly used confessions are different than

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[1] Kamisar, *What is an "Involuntary" Confession? Some Comments on Inbau and Reid's Criminal Interrogation and Confession*, 17 RUTGERS L. REV. 728, 753 (1963).

improperly obtained confessions.[2] The former focuses on the impropriety of presenting the evidence at trial, while the latter focuses on the impropriety of the interrogation methods used to obtain the confession. This distinction means that while there may be reasons for arguing the inadmissibility of a confession at trial, this does not entail banning the method by which the confession was obtained.

What we need, instead, is a more direct approach to confession and interrogation law for greater consistency, clarity, and manageability in practice. The objective proposal is an attempt to eliminate the difficulties inherent in the subjective approach while still preserving certain principles, such as mental freedom, fundamental, fairness, and reliability that historical tests of confession admissibility sought to protect.

[2] *See* Loewy, *Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence from Unconstitutionally used Evidence*, 87 MICH. L. REV. 907 (1989). Loewy writes that unconstitutionally obtained evidence's "exclusion is thought desirable to deter such police behavior," and unconstitutionally used evidence "is excluded because the Constitution guarantees the defendant a procedural right to exclude the evidence."

II. A HISTORICAL LOOK AT TESTS OF CONFESSION ADMISSIBILITY

Historically, concerns about unreliability and impropriety have been the obvious reasons for excluding confessions. By examining the different standards that have been applied, revised, and denied, it will be clear why there is a need for a more concrete and administrable standard to determine the impropriety of interrogation methods.

A. MEDIEVAL LAW OF PROOF AND TORTURE

In medieval Continental Europe, the Roman-canon law of proof governed judicial procedure in cases of serious crime where death or severe physical maiming could be imposed. There were three fundamental rules or safeguards built into the European law of proof. First, the court could convict an accused upon the testimony of two eyewitnesses to the crime. Second, if there were not two eyewitnesses, the court could convict the accused only upon the basis of the defendant's own confession. Third, circumstantial evidence was not adequate for

conviction, no matter how compelling.[3] Guilt required stringent evidence, consequently, the maxim of the medieval Glossators was *Confessio est regina probationum,* confession is the queen of proof, and torture became a primary method of inducing confessions.[4]

The medieval law of proof could be upheld in easy cases where there were two eyewitnesses or a voluntary confession, but in the more difficult cases, the only way to convict the accused relied upon her confession. In order to get the confession, judicial torture was employed. Physical abuse and threats of continued torture were part of ordinary criminal procedure throughout continental Europe by officers of the state tasked with investigating and prosecuting crime. The law of torture developed in northern Italy in the thirteenth century within the Roman-canon inquisitorial tradition.[5] It spread throughout Europe and survived into the nineteenth century in some corners of central Europe.

Torture was not conducted arbitrarily. It was only permitted when half-proof existed against the suspect. Half-proof meant there was either one eye-witness or there was circumstantial evidence that equated to one-half. For example, if a suspect were found with the bloody dagger from the murder and the missing money, each *indicium* would be a quarter proof. Together, the evidence

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[3] John Langbein parallels the American judicial system of confessions and coerced guilty pleas to Continental medieval torture in his book *Torture and the Law of Proof*, (Chicago: The University of Chicago Press, 1977).
[4] *Id.* at 3

equaled half-proof; hence, the suspect could be sent for examination in the local torture chamber.[6] A medieval form of probable cause had to exist before torture was allowed. The system was designed so that only those persons highly likely to be guilty would be examined under torture.

There were also rules to enhance the reliability of the confession. Torture was supposed to be employed so that the accused would confess to the details of the crime. In other words, according to the German *Constitutio Criminalis Carolina* of 1532, the accused must confess to information "no innocent person can know."[7] This means that suggestive questioning was not allowed. Furthermore, the information admitted under torture had to be investigated and corroborated to verify the confession. Also to ensure the voluntariness of the confession, the admission of guilt had to be repeated the next day in open court and free from torture. However, if the accused recanted and claimed his innocence, torture could be reapplied.

Medieval torture illustrates the fear behind police impropriety and the demands for safeguards. Though the methods of medieval times are clearly condemned within our legal system, the fear of the sorts of interrogation techniques eminent in the medieval law provoked the need for safeguards. Initially, precautionary rules were concerned with nothing more than reliability or

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[5] *Id.*
[6] *Id.* at 5.

voluntariness. Much later, questions of justice and fairness began to play a prominent role in confession admissibility.

B. REQUIREMENTS OF RELIABILITY

Traditionally, a confession required reliable or trustworthy statements. According to this standard, a confession was admissible as long as it was free from pressures that would cause the statements to be untrue.[8] The reliability test easily outlaws practices like threats, promises, and torture, because the danger of falsity is great. Such conduct is apt to induce false confessions in order to stop the torture, prevent the threats, or enjoy the promises. Arguably, the reliability standard would permit lesser degrees of influence, such as deception or lengthy interrogations, because there is no reason to doubt the truth of the statements. Under the reliability standard, the interrogator has to follow just one maxim: nothing shall be done or said to the suspect that will be apt to make an innocent person confess.[9]

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[7] *Id.*

[8] *See* 3, Wigmore, *Evidence* § 822 (1970). Wigmore advocates that the reliability test should be the only test. He claims that if there is no reason to doubt the truth of a statement, then it should be used against the defendant. Inbau and Reid are probably the best-known supporters of Wigmore's reliability theory. *See* Inbau, Reid, and Buckley, *Criminal Interrogation and Confessions* (3d ed. 1986). Only Inbau and Reid authored the previous two editions. Buckley joined the third edition upon the death of Reid in 1982. All subsequent references to Inbau will be in regard to the third edition.

[9] Inbau, *supra* note 8 at xvii.

On its face, the reliability standard seems like a common-sensical test for the admissibility of confessions. If the goal of interrogation is to seek the truth, then why should conduct be prohibited if there is no reason to doubt the truth of the particular statement? However, reliability does not address constitutional considerations or concerns of justice and fairness. By itself, the standard does not prevent compelled self-incrimination as protected by the Fifth Amendment, nor does it allow prohibiting unfair conduct apart from the actual truth or falsity of the confession. A standard was needed despite reliability that instituted constitutional considerations to protect innocent persons from police misconduct and to prevent methods that would offend "a sense of justice."[10]

C. THE VOLUNTARINESS STANDARD

It was recognized that both the reliability and voluntariness of statements are important in deciding the admissibility of confessions. Commonly, voluntariness is grounded in the constitutional right of the Fourteenth Amendment, which denies the States the power to "deprive any person of life, liberty, or property, without due process of law." In 1941, Justice Roberts wrote for the majority opinion in *Lisenba v. California* that "the aim of the requirement

[10] Brown v. Mississippi, 297 U.S. 278, 285-86 (1936).

of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false."[11]

In 1943, the Court recognized the necessity of "civilized interrogation techniques" above and beyond merely voluntariness or reliability. [12] Justice Frankfurter spoke for the majority stating, "Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence."[13] Justice Frankfurter summarized these "civilized standards" as "due process of law."[14]

Despite its importance, due process is not a clear concept. The primary test for defining government conduct that offends due process is whether the evidence was obtained in a manner that "shocks the conscience of mankind."[15] Moral judgments must be made as to when conduct offends "canons of decency and fairness which express the notions of justice,"[16] but it is not readily agreed upon as to what is "so rooted in the traditions and conscience of our people as to be ranked as fundamental,"[17] or what shall be agreed upon as "implicit in the

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[11] 314 U.S. 219, 236 (1941).
[12] McNabb v. U.S, 318 U.S. 332, 340 (1943).
[13] *Id.*
[14] *Id.*
[15] Rochin v. California, 342 U.S. 165, 172 (1952).
[16] Malinski v. New York, 324 U.S. 401, 416-17 (1945).
[17] Cardozo, J., writing for the majority in Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

concept of ordered liberty."[18] The vagueness of due process does not imply that justice and fairness are not implicit in valid confessions, but it does prompt the need for a more concrete and administrable standard.

A prevailing test for voluntariness, via the constitutional provision of due process, is whether a confession is free from coercion. Coerced confessions were regarded as a prime example of conduct that "offended the community's sense of fair play and decency."[19] So as long as a confession was not coerced, it satisfied conditions of voluntariness, as well as reliability; however, the language of coercion at this point was just as ambiguous as the due process clause it was meant to define.

Different rationales that coercion violates due process have been offered. In 1944, the Supreme Court ruled that a lengthy interrogation was "inherently coercive."[20] In *Ashcraft v. Tennessee*, the defendant confessed after thirty-six hours of questioning without rest or sleep by interrogators who operated in relays. The Court held that the confession was involuntary based on the argument that the state's action was "irreconcilable with the possession of mental freedom by a lone suspect against whom its full coercive force is brought to bear."[21] The Court

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[18] Cardozo, J., writing for the majority in Palko v. Connecticut, 302 U.S. 319, 325 (1937).
[19] *Supra* note 15 at 171.
[20] Ashcraft v. Tennessee, 322 U.S. 143, 154 (1944).
[21] *Id.* at 153.

ruled that the "inherent coerciveness" of the interrogation violated due process, rendering the confession involuntary.

Justice Jackson dissented, conceding that a confession induced by "brutality, torture, beating, and starvation... is prima facie involuntary," because some "will risk the postponed consequences of yielding to a demand for a confession in order to be rid of present or imminent physical suffering." However, unlike violence, interrogation is not "an outlaw." Justice Jackson argued, there is no clear line as to when confessions are coerced:

> Even a "voluntary confession" is not likely to be the product of the same motives with which one may volunteer information that does not incriminate or concern him...[the term] does not mean voluntary in the sense of a confession to a priest merely to rid one's soul of a sense of guilt...A confession is wholly and incontestably voluntary only if a guilty person gives himself up to the law and becomes his own accuser. The Court bases its decision on the premise that custody and examination of a prisoner for thirty-six hours is "inherently coercive." Of course it is. And so is custody and examination for one hour.[22]

Justice Jackson's exegesis indicates that a police interrogation of any length will unavoidably involve some element of coercion.[23] Similarly, this viewpoint is reflected in *Stein v. New York*, where the Court upheld the conviction

[22] *Id.* at 160,161.
[23] This idea was noted in Oregon v. Mathiason, 429 U.S. 492 (1977).

of murder for three defendants based on confessions produced by extensive interrogation:

> Of course, these confessions were not voluntary in the sense that petitioners wanted to make them or that they were completely spontaneous, like a confession to a priest, a lawyer, or a psychiatrist. But in this sense no criminal confession is voluntary.[24]

Instead of inherent coercion constituting involuntariness, rhetoric, such as "freedom of the will" and "overborne wills," was employed. Justice Frankfurter emphasized that a voluntary confession should be the product of the suspect's free and rational choice:

> The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.[25]

The "overborne will" language does not determine when a confession is

[24] 346 U.S. 156, 186 (1952).
[25] Culombe v. Connecticut, 367 U.S. 568, 602 (1961).

free from coercion any better than previous tests for voluntariness. The problem of ambiguity remains, even to a greater degree, in words such as such as "essentially free," "unconstrained choice," "overborne," and "critically impaired." It is questionable whether tests of voluntariness are doing any real work at all in determining confession inadmissibility:

> Is "involuntariness" or "coercion" or "breaking the will" (or its synonyms) little more than a fiction intended to vilify certain "effective" interrogation methods? Is "voluntariness" or "mental freedom" or "self-determination" (or its equivalents) little more than a fiction designed to beautify certain other interrogation techniques?[26]

Professor Kamisar supports eliminating voluntariness terminology altogether. He quotes, "It is fatuous, to be sure, to suppose that there will ever be a vocabulary free from all ambiguity.... But there are some words which, owing to their history, needlessly obstruct clear thinking."[27] Professor Kamisar adds that "voluntary," "involuntary," *et al.*, are surely among those needless words.[28] If voluntariness language is unnecessary, it would clear up confession law tremendously by actually getting rid of the ambiguous language and stipulating more precisely what offends due process.

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[26] Kamisar, *supra* note 1 at 745-46.
[27] Frank, *Fate and Freedom* 139 (1945), cited in Kamisar *supra* note 1 at 759.
[28] Kamisar *supra* note 1 at 759.

D. TOTALITY OF THE CIRCUMSTANCES

Instead of developing an objective standard, the Court decided that each case should be decided on its own facts, namely, "totality of the circumstances."[29] Justice Goldberg wrote for the majority in *Haynes* stating:

> The line between proper and permissible police conduct and techniques and methods offensive to due process is, at best, a difficult one to draw, particularly in cases such as this where it is necessary to make fine judgments as to the effect of psychologically coercive pressures and inducements on the mind and will of an accused.[30]

Totality of the circumstances entails making "fine judgments" of the individual's characteristics and the psychological pressure of the interrogation with respect to the particular defendant to determine whether certain interrogation tactics are coercive.

For example, if the police conduct in question were whether a lengthy interrogation was coercive, the answer would depend on an evaluation of the entire situation, including the defendant's individual characteristics. According to the test, as long as the defendant could handle the psychological pressure, for

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[29] Haynes v. Washington, 373 U.S. 503, 514 (1963). "Totality of the circumstances" was also invoked in prior cases: Fikes v. Alabama, 353 U.S. 191 (1957) and Payne v. Arkansas, 356 U.S. 560 (1958).

[30] 373 U.S. at 515.

instance a calm, even-tempered, rational adult or a hardened criminal, then, the police conduct was not considered coercive and the confession was admissible. However, circumstances like emotional instability or youth would make the same police conduct psychologically coercive thereby invalidating the confession.

Inconsistency and vagueness enveloped decisions based on the totality of the circumstances. The highly subjective nature of the test caused a huge administrative burden on the Supreme Court because lower courts could not apply it properly. As a direct result, the Court used *Miranda* as an attempt to objectify confession law.

E. MIRANDA – AN ATTTEMPT TO OBJECTIFY CONFESSION LAW

In 1966, the Supreme Court identified the need for objectivity in determining confession admissibility and developed the *Miranda* warnings in the 5-4 decision of *Miranda v. Arizona*.[31] The Court mandated that before a custodial interrogation, the person in custody must be advised of the constitutional right against self-incrimination. This landmark decision attempted to objectify confession law by creating a test that would render confessions inadmissible. If police failed to confer the required warning, any resulting confession, without a

valid waiver, would be invalid. Typically the rights are summarized as the following:

1) You have the right to remain silent.
2) Anything you say can and will be used against you in a court of law.
3) You have the right to talk to a lawyer and have him present with you while you are being questioned.
4) If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish.

It is also implicitly understood that *Miranda* intended to express a fifth right, even though police are not required to read the advisement:

5) You can decide at any time to exercise these rights and not answer any questions or make any statements.[32]

Miranda warnings were created solely to ensure the Fifth Amendment right that no person "shall be compelled in any criminal case to be a witness against himself."[33] Miranda warnings include advising a suspect of his right to an attorney, so it would seem that Miranda was also created to ensure the Sixth Amendment right that "in all criminal prosecutions, the accused...shall have the

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[31] 384 U.S. 436 (1966).
[32] Inbau *supra* note 8 at 221. *See also* Miranda v. Arizona, 384 U.S. at 444.
[33] See also Inbau *supra* note 8 at 221 for further emphasis of this point.

assistance of counsel for his defense." However, the purpose of *Miranda* is not to assert that a custodial interrogation is a criminal prosecution that invokes the independent right to an attorney. The advisement of the right to counsel during a custodial interrogation is only meant insofar as to implement the Fifth Amendment protection against self-incrimination. In other words, *Miranda* could be read as, "You have the right to an attorney who will ensure you do not incriminate yourself."

Chief Justice Warren wrote for the majority of the Court emphasizing the narrow scope of constitutional considerations *Miranda* is based on:

> Accordingly we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation under the system for protecting the privilege we delineate today.[34]

The delineation referred to is the protection against self-incrimination, and the importance of the presence of an attorney is to make sure Fifth Amendment privileges are respected during a custodial interrogation.

Miranda sought to put constitutional limits on police conduct during interrogations; however, it did not seem to clear up coercion questions as

[34] 384 U.S. at 443.

objectively as anticipated.[35] Two fundamental problems with the *Miranda* standard concerning the determination of coercion can be identified. First, it further obfuscates the notion of voluntariness and coercion. Second, it does not restrict coercive interrogation misconduct after a valid waiver is obtained.[36]

It is argued that *Miranda* established a harmful recapitulation of the voluntariness standard. The contention is that, the old voluntariness test was simply transferred to determining the validity of a *Miranda* waiver.[37] Unless a defendant voluntarily consented to waiving the constitutional right against self-incrimination, the confession was deemed inadmissible. It is argued that instead of solving the uncertainty and vagueness of voluntariness, the same problems were shifted from the voluntariness of the statements to the waiver provisions of *Miranda*.[38]

A further problem occurs because *Miranda* does not provide an objective standard for determining police misconduct after a valid waiver. As a result, there

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[35] A few critical arguments against the usefulness of Miranda warnings and its decline include: Rosenberg, I.M. and Y.L. Rosenberg, *A Modest Proposal for the Abolition of Custodial Interrogations*, 68 N.C. L. REV. 937 (1989); Grano, *Confessions, Truth, and the Law* (Ann Arbor: The University of Michigan Press, 1993), specifically Ch. 7: *Miranda* as a Prophylactic Decision and Ch. 8, Overruling *Miranda*; Ogletree, *Are Confessions Really Good for the Soul? A Proposal to Mirandize* Miranda, 100 HARV. L. REV. 1826 (1987); and Caplan, *Questioning* Miranda, 38 VAND. L. REV. 1417 (1985).

[36] This point is outlined in the article by James Thomas, *Police Use of Trickery as an Interrogation Technique*, 32 VAND. L. REV. 1167, 1181 (1979).

[37] *See* Dix, *Mistake, Ignorance, Expectation of Benefit, and the Modern Law of Confessions*, 1975 Wash. U.L.Q. 275, 300.

[38] *See* Note, *Deceptive Interrogation Techniques and the Relinquishment of Constitutional Rights*, 10 RUT.-CAM. L.J. 109 (1978).

are two separate occasions where coercion can arise. Police misconduct might coerce a defendant to waive constitutional rights, or coercion could occur after a valid waiver of *Miranda* in regard to the specific tactics employed to elicit a confession. *Miranda* only addresses the former occasion and implies that a confession is not coerced if the defendant voluntarily waives *Miranda* rights.

In response to the uncertainty that arises from *Miranda* and the ambiguous and vague nature of tests based on reliability, voluntariness, or totality of the circumstances, this paper proposes an objective standard for determining police misconduct and confession inadmissibility. The proposal is an attempt to provide an objective reliability-voluntariness test that sufficiently protects the Fifth Amendment right against self-incrimination.

III. THE NEED FOR AN OBJECTIVE VERSUS SUBJECTIVE STANDARD

When determining the admissibility of confessions, courts either invoke subjective or objective standards of reliability. Under a subjective standard, the court focuses on the *actual* pressure a particular defendant feels from the methods of interrogation utilized in that case. An objective standard, on the other hand, disregards individual characteristics and focuses on the likelihood that the police conduct will tend to induce false confessions. The two reliability standards can be summed up in this way:

> (A) Is *this particular* defendant's confession "unreliable" or "untrustworthy?" of (B) What is the likelihood, objectively considered, that the interrogation methods employed in this case create a substantial risk that a person subjected to them will falsely confess—*whether or not this particular defendant did*?[39]

The first standard, reliability (A), takes into account the personal characteristics of the defendant and the particular powers of resistance to the police conduct. The ultimate question is, did the interrogation methods *actually* create too substantial a danger of falsity? The second standard, reliability (B), disregards the particular defendant, and, instead, focuses on the particular

interrogation methods utilized in the case. The question now becomes this: are the interrogations methods used in this case sufficiently likely to cause a significant number of *innocent* persons to confess?[40]

At first glance, there appears to be a paradox between objective ideals and subjective reality. While an objective standard is desirable to lend concrete guidance to the courts and interrogators, the fact remains that suspects subjected to police interrogation do not have uniform characteristics or equal powers of resistance. If individual responses to police pressure affect confession admissibility, then why is an objective standard for improper interrogation methods better than subjective determinations?

An important distinction needs to be made between the purposes of objective and subjective unreliability. Subjective unreliability administrates *admissibility* concerns, while objective unreliability regulates improper interrogation methods. Professor Kamisar discusses the different purposes between subjective and objective reliability:

> In short, much more often than not, if not always, when the Court considers the peculiar, individual characteristics of the person confessing, it is only applying a rule of *inadmissibility*. "Strong" personal characteristics rarely, if ever, "cure" forbidden police methods; but "weak" ones may invalidate what are generally permissible methods.[41]

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[39] Kamisar *supra* note 1 at 753.
[40] *Id.* at 755.
[41] Kamisar *supra* note 1 at 758.

Acknowledging the distinction between objective and subjective reliability clarifies confession law tremendously. The upshot is that subjective unreliability may be grounds for the inadmissibility of a particular confession; however, subjective unreliability should not be grounds for prohibiting police conduct. Stated differently, an objective standard is used to determine impermissible interrogation methods while a particular defendant's characteristics and powers of resistance may be grounds for inadmissibility.

The distinction between inadmissibility concerns of subjective reliability and impropriety concerns of objective reliability has two practical results. First, inadmissibility will not incorrectly prohibit permissible interrogation techniques. This means that grounds for inadmissibility will not always invalidate interrogation methods, but improper interrogation methods are always impermissible regardless of the particular defendant's power of resistance. The interrogator should be allowed to use individual strengths and weaknesses of a suspect to ascertain the truth from a guilty offender. Subjective unreliability may exclude a confession, but it should not unconditionally ban interrogation methods.

The second beneficial result of an objective standard is the accuracy of confession law. If subjective standards incorrectly prohibit police conduct, then, subsequent exclusions based on the prohibited method of interrogation will be incorrect. Realizing there are different purposes behind subjective and objective

reliability tests can break the vicious circle of inaccuracy. The purpose of subjective reliability should be understood as grounds for excluding a confession based on otherwise permissible police conduct. Objective reliability should be used to determine the propriety of police methods of interrogation.

IV. A PROPOSAL FOR AN OBJECTIVE STANDARD TO DETERMINE IMPROPER INTERROGATION METHODS

The standard proposed in this paper stresses that methods of interrogation should be limited by objective standards. In turn, certain methods of interrogation will be explicitly prohibited. The search for an objective standard in determining improper interrogation methods is not new. [42] Some objective proposals allow everything short of torture, threats, and promises, others forbid any form of trickery or deceit, and a few suggest eliminating custodial confessions altogether.[43]

Subjective tests are problematic because there is not enough guidance for the courts or interrogators. In contrast, there are three benefits to an objective standard. First, the interrogator knows explicitly what is impermissible. He does not have to try to guess how the court will respond to a certain tactic based on the particular defendant's strengths or weaknesses. Second, the constitutional rights

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[42] Similar objective proposals can be found in White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581, 597, 599, 600, 617, 624 (1979) and Thomas, *supra* note 36 at 1190.

White advocates the need for per se rules to prohibit deceit and trickery. His objective proposal says, "Police should not engage in conduct that...invariably or nearly always results in...a coerced confession or negate[s] constitutional protections." White's standard prohibits obvious practices like "tricks that take on the character of threats or promises." His standard also prohibits telling the suspect that you know she is guilty.

Thomas has a similar objective proposal to regulate deceit and trickery. "The test is whether a reasonable innocent person would feel that he is being confronted with proof of his guilt." Thomas mentions four particular techniques that violate the standard: 1) accomplice confession ploy; 2) physical evidence ploy; 3) fictitious eyewitness; and 4) staged identification.

of suspects are better protected. If the rules are ill-defined, the risk is greater that an interrogator will disregard constitutional protections. Third, courts have guidance for consistent rulings. An objective standard allows precedent to be set and followed by both the courts and interrogators.

The proposed objective standard for determining improper methods of interrogation is as follows:

> A method of interrogation is improper if the conduct:
>
> (1) would be likely to make an innocent person confess (not that it necessarily does but that it would tend to); or
> (2) engages in trickery or other forms of deception to obtain a *Miranda* waiver.

Test (1) and (2) are respectively, objective tests for unreliability and voluntariness.

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[43] See Rosenberg, *supra* note 35 and Schaefer, *Police Interrogation and the Privilege Against Self-Incrimination*, 61 NW. U. L REV. 506 (1966).

V. OBJECTIVE UNRELIABILITY

The objective unreliability standard directly determines the propriety of police conduct without invoking subjective judgments of the strengths or weaknesses of particular defendants. Although unreliability focuses on the likelihood that police conduct will induce false confessions, due process considerations are not ignored. The methods of interrogation that the standard prohibits most likely also "shock the conscience," but the ambiguity that is associated with due process is not necessary for this objective test.

Offending due process is a constitutional consideration that could independently invalidate interrogation methods. It is possible to imagine that an interrogation method could arise that is so contrary to our system of justice that it offends due process without any possibility of resulting in a false confession. However, as Professor Kamisar notes:

> I am convinced that were the appropriate case to arise, one with a sufficient degree of offensive or deliberate and systematic police misconduct, the Supreme Court would exclude the confession as a matter of due process even though neither the particular defendant *nor anybody else* were at all likely to falsely confess under the circumstances. But no such case has arisen.[44]

Until such cases arise, the objective standard will sufficiently identify improper methods of interrogation.

VI. SPECIFIC INTERROGATION METHODS THAT VIOLATE OBJECTIVE UNRELIABILITY

A. THE USE OR THREATENED USE OF FORCE

Fear of torture and the need for safeguards to prevent police misconduct date back to medieval times. It is no surprise to our society that confessions obtained through direct physical harm, such as striking the suspect, are categorically excluded. The Court explained in *Stein v. New York*, obvious methods of interrogation, namely, physical violence, serve no lawful purpose, and "when present, there is no need to weigh or measure its effects on the will of the individual victim."[45]

Not only is torture wrong per se, but it also is likely to induce false confessions. An early example of the application of a reliability test to torture occurred in 1936 in *Brown v. Mississippi*. The defendant was hung from a tree and whipped until he "agreed to confess to such a statement as the deputy would dictate."[46] Brown claimed the confession obtained by the physical torture was false. The Court agreed and stated that a trial is "a mere pretense where the state authorities have contrived a conviction resting solely upon confessions obtained

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[44] *Supra* note 1 at 754-55.
[45] 346 U.S. at 182.
[46] 297 U.S. at 281.

by violence."[47] Later, in *Chambers v. Florida*,[48] the Court extended the same standard to psychological torture or coercion. Although the same considerations are given to physical and psychological torture, the line between abuse and mere psychological pressure is more difficult to draw.

Modes of indirect force, such as lengthy interrogations by relays of multiple interrogators or the deprivation of food, water, sleep, or access to toilet facilities, are examples of controversial psychological torture. The interrogation process is not required to be relaxing and easy on the suspect, but the discomfort cannot amount to harm or punishment. The question becomes, to what extent or degree do the deprivations constitute force? Denying smoking privileges or a lunch break are not threats that would cause an unreliable statement. However, refusing food and water until the defendant confesses becomes a use of force. Furthermore, the deprivation is seen as a threat to the defendant because her sustenance is predicated on the confession. It is likely that an innocent person will confess to stop lengthy interrogations or excessive deprivations.

There cannot be an explicit time limit or a list of privileges stipulated for interrogations. It is contended that a competent interrogation does not require more than four hours to obtain a confession from a guilty offender, but despite

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[47] *Id.* at 286.
[48] 309 U.S. 227 (1940).

this average, there should not be a definite limit on the length of interrogations. [49] Even though it may be common to obtain a confession in four hours, some stubborn offenders may require a longer interrogation. Moreover, if there is a time limit, the offender can resist any pressure to confess knowing that the interrogation must cease at a certain time.

Evaluating difficult cases with the objective standard does not provide definite answers for every degree of indirect force that might arise, but it does not prohibit indirect uses of force based on subjective judgments.

[49] Inbau, *supra* note 8 at 310.

B. PROMISES OF LENIENCY

Threats to convict a suspect for a more serious crime or harsher sentence unless a confession is produced constitute grounds for rejecting the confession. Likewise, promises of leniency are also intolerable. An interrogator cannot offer leniency to the degree that it would make an innocent person confess. Advisements of typical sentence reductions or offering to recommend a lighter sentence is not improper conduct. However, promises of leniency or impermissible benefits should be prohibited based on the likelihood of inducing false confessions.

For example, promising to release a suspect's daughter from prison who has been indicted for narcotics as long as the suspect confesses is improper and would invalidate a confession. In this example, the interrogator is promising impermissible benefits that create a substantial risk that an innocent person will falsely confess in order to help her daughter.

Ambiguous phrases, such as "it would be *better* to confess," are controversial promises of leniency. Some argue that the word "better" refers to promises of leniency. Others would say the interrogator means that the suspect will feel *better* after confessing. The context of the phrase distinguishes the propriety of some offers from impermissible promises of leniency. If the

interrogator offers a lighter sentence or implies acquittal will result if a confession is offered, the promise is improper, but the promise that the defendant will feel exonerated from the confession would be permissible. Asking whether a false confession is likely, once again, best makes the distinction in borderline cases.

VII. THE OBJECTIVE INVOLUNTARINESS OF OBTAINING *MIRANDA* WAIVERS WITH METHODS OF TRICKERY OR DECEIT

Test (2), the unconstitutionally obtained waiver consideration, defines the methods of trickery or deceit that are impermissible. Specifically, interrogators should be allowed to use deceit as long as trickery is not used to obtain a *Miranda* waiver. The permissibility of trickery and deceit is inherent in the purpose of interrogations. To prohibit them would essentially call for the absolution of the interrogation process.

A. DEFINING TRICKERY AND DECEIT

James Thomas defines trickery as "any police attempt to confront a suspect undergoing interrogation with evidence of his guilt when no such evidence exists."[50] Under this definition tactics like falsely claiming the suspect's fingerprints have been identified at the crime scene or confronting the suspect with a false confession from an accomplice would be considered tricks or deceitful.

Besides false evidence, being deceitful could mean anything purposely misleading or intentionally dishonest. This characterization would include

developing "themes" to sympathize or empathize with the offender. It could also include providing an "out" for the offender by downgrading the moral significance of date rape or child molestation when in reality it is revolting to the interrogator.

Another widely used tactic is called the "Mutt and Jeff routine" or the "friendly-unfriendly" act. [51] This trick involves two interrogators[52] essentially playing contrasting roles. The routine operates in a similar manner to this depiction: Interrogator A method enters as a sympathetic and understanding friend. A leaves the room, and Interrogator B enters. B, verbally condemns the suspect and points out objectionable characteristics. Interrogator B then leaves acting completely disgusted with the suspect. Interrogators A and B could be in the room at the same time, whereupon B might admonish A's sympathy for such an undesirable person.[53]

The psychological reason for the effectiveness of this act is the contrast between the interrogators. The goal of the act is for the feigning of sympathy to become effective in order to induce the disclosure of the truth. The suspect is

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[50] *Supra* note 36 at 1182.
[51] Inbau, *supra* note 8 at 151-52.
[52] One interrogator who switches between the roles can also do this act.
[53] *Supra* note 51.

expected to feel guilty from the disgust of the unfriendly interrogator, in which case, the suspect will want to confess to the friendly and sympathetic listener.[54]

Generally speaking, trickery and deceit means any psychological persuasion used to induce a reluctant criminal offender to confess. Seemingly non-complex tricks would include ploys like using straight-back chairs or maintaining a close proximity between the suspect and interrogator to establish a psychologically, as well as, physically close environment. Psychological influences range from the professional attire of the interrogator to lying to a defendant that an accomplice has confessed.

It is argued that tactics to trick a defendant into confessing, in other words, playing on a particular defendant's strengths and weaknesses, puts the defendant on an "unequal footing" with the interrogator.[55] The objection is that interrogation should consist of fair play, and interrogators should not use the lower intelligence or vulnerability of a suspect to induce a confession.

This objection to the use of trickery and deceit undermines the very purpose of an interrogation. If, presumably, the defendant is using deception to "distort or deny the truth" of his actual guilt for a crime, then the goal of the interrogator, necessarily, is "to decrease the suspect's perception of the

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[54] Inbau stresses the professionalism of acts such the "friendly-unfriendly" routine. The chapters outline a hierarchy of desirable tricks. Presumably, the professional interrogator will employ harsher tactics as a last resort and only on suspects whose guilt is definite or reasonably certain. *See* Inbau *supra* note 8 at 151.

consequences of confessing, while at the same time increasing the suspect's internal anxiety associated with his confession."[56] The purpose of an interrogation is to persuade the suspect to perceive the consequences of a confession as more desirable than the continued anxiety of hiding or denying the truth. Based on the persuasive purpose of interrogations, it is argued that interrogators should be allowed to outsmart suspects:

> No reasonable person who accepts the basic legitimacy of society and its laws can endorse the view that a guilty suspect, like a fox during a hunt, must be given a sporting chance to escape conviction and punishment...Equality between contestants makes for good sports, but in a criminal investigation we should be seeking truth rather than entertainment.[57]

The interrogator's goal is to apply pressure to increase the "suspect's internal feelings of uneasiness as a result of [her] own cognitive dissonance."[58] Tricks that use a suspect's strengths or weaknesses should not be regarded as an improper abuse of inequality but as a valid means to the ascertainment of truth.

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[55] Gallegos v. Colorado, 370 U.S. 49, 54 (1962).
[56] Jayne, *The Psychological Principles of Criminal Interrogation*. This is the Appendix of Inbau *supra* note 8 at 327.
[57] Grano, *Selling the Ideas to Tell the Truth: The Professional Interrogator and Modern Confession* Law, 84 MICH. L. REV. 662 at 677.
[58] Jayne, *supra* note 56 at 332.

B. THE PURPOSE OF INTERROGATIONS

From a law enforcement agent's view, the "the primary function of an interrogation is to obtain an admission of guilt from a guilty person."[59] However, it seems that interrogations serve a more complex, dual purpose. The purpose of an interrogation is to either a) discover or corroborate evidence pointing to the suspect's guilt; i.e., obtaining an admission of guilt from a guilty person (or obtaining information about the true suspect's guilt in the case of interrogating an accomplice); or b) verify innocence.

Interrogation is arguably an art. Inbau and Reid assert that interrogation should be accomplished by "specially trained professional interrogators" for three beneficial reasons:

1) there would be a considerable increase in the rate of confessions from criminal Offenders;
2) the confessions will more likely meet the prescribed legal requirements; and
3) there would be the expeditious and dependable elimination from suspicion of persons innocent of the crimes for which they have been incarcerated or subjected to questioning on a theory of their involvement in the offense.[60]

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[59] Aubry and Caputo, *Criminal Interrogation* (1965) at 24.

[60] Inbau, *supra* note 8 at 36. The authors argue that interrogators should fulfill certain qualifications because traits, for example, in an arresting officer are not the same traits that are needed in effective interrogation. For instance, impatience might be effective in completing an assignment, but it would be "a handicap in the interrogation room."

"Professionalizing" interrogations serves as another way to achieve the objectivity and consistency lacking in modern confession law.

A substantial portion of an interrogation is based upon reactions, behavioral clues, and social psychology. Everything from the moment the interrogator enters the room to the instant he walks out the door has an agenda. Interrogators are instructed to sit in close proximity to the suspect, face-to-face, in straight-back chairs with no other objects between them.[61] While this may seem like a minor detail, it serves to create a psychologically desirable environment, "for to be physically close is to be psychologically close."[62]

The idea is that a guilty suspect will be more willing to confess if there is no physical or psychological barrier to interfere with the interaction. Everything, from the conservative business attire to the form of addressing the suspect,[63] is calculated. Professional interrogations are not arbitrary. A properly trained interrogator does not just start talking and hope for a confession. Ideally, he knows how certain conduct will influence human behavior.[64]

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[61] *Id.* at 30.
[62] Driver, *Confessions and the Social Psychology of Coercion*, 82 HARV. L. REV. 42, 44 (1968).
[63] Inbau and Reid advise, "When interviewing persons of low socioeconomic status, address them as 'Mr.,' 'Mrs.,' or 'Miss.' rather than by their first names" and vice versa for suspects of high socioeconomic or professional status. The intent is to flatter the suspect of low socioeconomic status to defuse the feeling of superiority and independence in the suspect of high socioeconomic status. *See* Inbau, *supra* note 8 at 38-39.
[64] Driver *supra* note 62 at 56, Table 1. The table outlines "kinds of variables which are known to induce suspects to confess or resist confessing during noncoercive interrogation."

Interrogations and confessions play a vital role in our criminal justice system. Often, interrogations are the only way to get a criminal to confess or to discover facts that will lead to further evidence of the true perpetrator of the crime. Unfortunately, criminals are not lining up outside the police station to turn themselves in. Theodor Reik argues in his book, *The Compulsion to Confess*, that there exists a strong unconscious tendency to confess;[65] but usually the confession can only actualize under pressure.

Degrees of pressure range from the inherent fear and anxiety associated with arrest and detention to intentional interrogation techniques of trickery or other forms of deception. Some opponents may argue that interrogation techniques like deceit, trickery, or "intimation" apply undue pressure because such behavior is unethical. The argument against such "unethical" tactics is based on the notions of fairness and the protection of the innocent encapsulated in the maxim "innocent until proven guilty."

The false accomplice ploy, also known as "playing one against the other,"[66] is debatably unethical behavior. It involves telling a suspect that an accomplice has implicated her in the crime when no such evidence has occurred to the knowledge of the interrogator. The bluff is meant to make a guilty suspect feel that there is no need to continue asserting false innocence.

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[65] Reik, *The Compulsion to Confess: On the Psychoanalysis of Crime and Punishment* (1959) at 180.

Besides the interrogator's lies, it also seems unethical to cause unnecessary fear and distress in the suspect. This argument against the accomplice confession ploy is that "a reasonable, innocent suspect would feel that he was being confronted with evidence of his guilt" and "such abuse could cause extreme distress to the innocent suspect."[67] However, the purpose of a useful interrogation sometimes does entail using otherwise unethical interrogation tactics equally on the innocent and guilty because of the nature of the unsolved crime.

Fred Inbau illustrates the necessity for permitting unethical behavior in a case of a woman murdered by her brother-in-law. The confession was obtained by feigning friendliness and sympathy when no such feelings existed. Inbau insists that in cases like this, "unethical" behavior is necessary:

> In all of this, of course, the interrogation was "unethical" according to the standards usually set for professional, business, and social conduct, but the pertinent issue in this case was no ordinary, lawful, professional, business, or social matter. It involved the taking of a human life by one who abided by no code of fair play toward his fellow human beings...Of necessity, therefore, interrogators must deal with criminal suspects on a somewhat lower moral plane than that upon which ethical, law-abiding citizens are expected to conduct their everyday affairs.[68]

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[66] Inbau, *supra* note 8 at 132.
[67] Thomas, *supra* note 36 at 1195.
[68] Inbau, *supra* note 8 at xvi, xvii.

Arguments about the morality of interrogations are worthy of a separate paper. On the surface, Inbau's argument for "unethical" behavior is simpler than a philosophical debate on morality. What I gather Inbau to be alluding to is the following. It would be ideal if only guilty criminals were subject to interrogations, but the interrogator does not have the luxury of this knowledge, especially when clues pointing to the identity of the real killer do not exist. Interrogations are imperative in difficult cases, and the distress that a suspect feels is unavoidable because interrogations are necessarily accusatorial. Any reasonable person will feel distress in a confined room being interrogated by a law enforcement agent. Thus, it is not fair to say that a tactic is improper because it causes "distress to the innocent person." An innocent person feels distressed because of the false accusations, but a guilty person also feels distress out of guilt, fear of being caught, or even remorse.

The purpose of interrogations often involves outsmarting an untruthful suspect, but it does not imply that every deceptive interrogation technique is permissible. The difficulty in tactics involving trickery and deceit lies in delineating between the proper and improper use of such tactics.

C. DETERMINING IMPROPER TRICKERY AND DECEIT

Deceptive methods that are used to obtain a waiver of constitutional rights or intentionally lying about a defendant's constitutional protections are techniques that should be condemned. Other forms of trickery and deceit that are used during the interrogation process to induce confessions should not be grounds for excluding a confession.

Frazier v. Cupp[69] is the primary case regarding the "tacit approval" of the use of trickery and deception within the interrogation process.[70] In *Frazier*, the police falsely told the defendant that his accomplice had confessed. Reportedly, the ploy was not successful and only later did Frazier "voluntarily" confess. The Court concluded that "while relevant," the use of trickery, itself, is "insufficient to make an otherwise voluntary confession inadmissible."[71]

Advocates of a blanket prohibition of deceptive interrogation techniques contend that if trickery induced waivers should be a basis for exclusion, then trickery induced confessions should be equally invalid. Statements in *Miranda* were interpreted as evidence of the Court's condemnation of deceptive interrogation methods. The Court stated that "any evidence that the accused was

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[69] 394 U.S. 731 (1969)

[70] Inbau, *Legally Permissible Criminal Interrogation Tactics and Techniques*, 4 J. Police Sci. & Ad. 249, 251 (1976). Inbau also cites several other cases that "have upheld the legal validity of trickery and deceit in the interrogation process." See Inbau *supra* note 8 at 320.

threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege [against self-incrimination]."[72] The decision in *Frazier* was important because it supported the notion that the Court only intended to prohibit the use of trickery in obtaining a waiver.

Tests of voluntariness, totality of the circumstances, and due process (shocking the conscience) considerations have been applied to determine whether certain deceptive interrogation methods are grounds for excluding a confession. The usefulness of these standards is dubious because they rely on asking whether the particular defendant is "strong" enough to handle the tricks. Instead of determinations of "voluntariness" or "fundamental fairness," the question becomes, objectively speaking, does a certain method of interrogation trick the defendant into waiving the constitutional rights that Miranda was meant to protect?

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[71] 394 U.S. at 739.
[72] 384 U.S. at 476.

VIII. SPECIFIC INTERROGATION METHODS OF TRICKERY AND DECEIT THAT ARE IMPROPER

I will discuss two specific tricks that violate the objective standard.[73] The most obvious use of trickery in obtaining a waiver is deceptively changing the wording of Miranda warnings or adding on misleading caveats. There is no requirement "that the content of the *Miranda* warnings be a virtual incantation of the precise language contained in *Miranda*."[74] However, the interrogator cannot distort the language to confuse the suspect or disregard the significance of the suspect's Fifth Amendment Right against self-incrimination.

Interrogators are not required to repeat *Miranda* warnings, but the availability to invoke *Miranda* rights at any time during the interrogation cannot be denied or ignored. A person who remains silent or otherwise verbally consents to the interrogation has obviously invoked the constitutional right against self-incrimination. In instances where the suspect ambiguously waives *Miranda* rights, questioning should be limited to clarifying the waiver.

In the case that a suspect definitively refuses to talk, interrogation methods cannot be employed to try to change the suspect's mind. Unrelated conversation after an initial refusal to talk is prohibited even if the police are not addressing the

[73] This is not to suggest that only two improper uses of trickery to obtain a Miranda waiver are prohibited under the standard. The intent of describing these two specific tactics is to offer an example of the type of improper interrogation methods the standard captures.

relevant crime. The steadfast rule is that the willingness to talk after an initial invocation of constitutional rights must be initiated by the arrestee.[75] This makes sense because even idle chatter and small talk could be construed as an act of friendliness by the interrogator in order to induce the suspect to waive previously invoked constitutional rights.

Another improper use of trickery in obtaining Miranda waivers includes law enforcement officials concealing their identity to deceive the defendant as to whether an interrogation is occurring. Examples of this include a police officer posing as a priest who is ready to hear a guilty confession or an agent pretending to be a defense attorney in order to hear incriminating statements.

The reason for excluding confessions obtained in this way is that the impersonation undermines Miranda. The police officer is hiding and lying about the fact that a custodial interrogation is occurring. If the defendant does not even know she is being interrogated, she cannot invoke constitutional protections. Miranda rights, for example, the right to an attorney, must be made available during the entire period of questioning in a custodial interrogation:

> [T]he government must afford the suspect a continuous opportunity to assert his right to an attorney throughout the interrogation process. Deception about whether an interrogation is taking place, however, negates this opportunity. When a suspect is deceived about whether the

[74] California v. Prysock 453 U.S. 355 (1981).
[75] See Edwards v. Arizona, 451 U.S. 477 (1981) and Oregon v. Bradshaw, 103 S. Ct. 2830 (1984).

> government is seeking to elicit incriminating evidence from him, he obviously has little basis upon which to assess or reassess the question whether he needs the assistance of counsel during this phase of the adversary process.[76]

The interrogator must bear in mind that a defendant may invoke her Miranda rights at any time during the custodial confession. In the case that a defendant revokes the waiver, tricks cannot be used to obtain another waiver or to hide the fact that such rights are even available.

The impropriety of trickery in obtaining a waiver does not entail the prohibition of trickery or other deceptive tactics during the interrogation that follows a valid waiver. As an important interrogation tool, police must sometimes resort to tricks or other forms of deceit in order to induce a confession. It is an inherent part of the interrogation process to persuade an otherwise unwilling criminal to confess. Tricks such as falsely telling a criminal her fingerprints were found at the crime scene will be distressing to the criminal and feigning sympathy or understanding for why a rapist seeks children may seem unethical, but Inbau reminds the skeptic of this:

> Moreover, let us bear this thought in mind: From the criminal's point of view, any interrogation is unappealing and undesirable. To him it may be a "dirty trick" to encourage him to confess, for surely it is not being done

[76] White, *supra* note 42 at 603-4.

> for his benefit. Consequently, any interrogation might be labeled as deceitful or unethical, unless the suspect is first advised of its real purpose.[77]

This standard narrowly limits the impropriety of deceptive interrogation methods to trickery in obtaining Miranda waivers. Valuable tactics like presenting false evidence such as fingerprints, "playing one accomplice against another, placing blame upon, and condemning the victim, lying to a murder suspect that the victim was still alive, and other similar tactics" do not create a risk of an improperly obtained waiver. As long as the defendant is not tricked into believing Miranda rights are not available, confessions involving the use of trickery and deceptive interrogation methods should be admissible evidence at trial.

[77] Inbau, *supra* note 8 at xvii.

V. CONCLUSION

The purpose of this paper was to identify the problems associated with using a subjective standard to determine the propriety of police conduct. While subjective reliability tests are necessary for admissibility rules when there are reasons to doubt a particular defendant's confession, the subjective concerns should not be sufficient grounds to prohibit police conduct.

An objective standard for reliability and voluntariness concerns is the best approach for achieving consistency in court rulings, guidance for interrogators, and protection of defendants' constitutional rights. The objective proposal limits improper interrogation methods to conduct that would be likely to make an innocent person confess or the use of trickery in obtaining a *Miranda* waiver.

The more precise standard prohibits obvious improper conduct while still permitting valuable methods of interrogation, such as trickery or other forms of deception, which some subjective and more restrictive standards would forbid. The objective standard gives the interrogator the discretion to use psychological ploys to ascertain the truth from an otherwise untruthful criminal offender, and it also clarifies the grounds for subjective rulings of inadmissibility.

The objective standard could improve the deterrence of police misconduct. Subjectivity provides procedural reasons for excluding confessions from

evidence, but objectivity adds substantive justification for the defendant to seek redress from the government for police misconduct.

As a further deterrence for police misconduct, third parties should also have a right to challenge the improperly obtained evidence against them. [78] For example, if physical abuse is employed and a suspect confesses to an accomplice's guilt, the accomplice should have standing to exclude the confession even though as a third party, the accomplice was not directly subjected to the improper interrogation methods.[79] If the conduct in question satisfies the impropriety standard of the objective proposal, the "fruits" of the interrogation should not be used to uphold a conviction for a third party.[80]

However, this does not mean that all evidence is "fruit of the poisonous tree simply because it would not have come to light but for the illegal actions of the police." For example, if the improper interrogation methods point to a third party but the discovery of the challenged evidence "has become so attenuated as to dissipate the taint," then the evidence should not be excluded.[81] Arguably, the objective standard would be grounds for exclusion of evidence against third

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[78] Loewy, *supra* note 2 at 937. Loewy refers to cases where third parties should have standing to challenge improperly obtained confessions as "coerced-confession-plus cases."

[79] See People v. Portelli 15 N.Y.2d 235, 205 N.E.2d 857, 257 N.Y.S.2d 931 (1965), cert. denied, 382 U.S. 1009. In this case, the police questioned Richard Melville, a man they believed had information implicating Portelli. They used physical abuse and threats until Melville admitted that Portelli had confessed to the crime. The New York Court of Appeals condemned the police behavior but allowed Melville's testimony and upheld the conviction against Portelli.

[80] This proposition is analogous to excluding any evidence found as a result of an illegal search or seizure, "the fruit of the poisonous tree," United States v. Wong Sun, 371 U.S. 471 (1963).

parties, which would serve as a further means to reduce police incentive to use unconstitutional methods of interrogation.

[81] United States v. Nardone, 308 U.S. 338, 341 (1939).

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